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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN R.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D050249

(San Diego County
Super. Ct. No. J515454)

PROCEEDINGS in mandate after reference to a Welfare and Institutions Code section 366.26 hearing. Hideo Chino, Commissioner. Petition denied.

Juan R., the father of Isabella M., seeks extraordinary writ relief (Welf. & Inst. Code, § 366.26, subd. (1)¹; Cal. Rules of Court, rule 8.452),² challenging the juvenile

¹ All statutory references are to the Welfare and Institutions Code.

court order terminating his reunification services and setting a section 366.26 hearing. Juan contends there was insufficient evidence that returning Isabella to his custody would create a substantial risk of detriment to her.

We issued an order to show cause, the San Diego County Health and Human Services Agency (Agency) responded, and the parties waived oral argument. We review the petition on its merits and deny it.

FACTS

In May 2004, Agency took Isabella, then three years old, into protective custody after her mother was arrested on two outstanding felony warrants. The mother identified Isabella's father as Juan, who was incarcerated in Las Vegas, Nevada.³

On May 25, 2004, Agency filed a dependency petition on behalf of Isabella, alleging she had been left without any provision for support because the mother was incarcerated and the whereabouts of the father were unknown. (§ 300, subd. (g).)

On July 21, 2004, the juvenile court sustained the petition. The court also declared Isabella a dependent child, removed her from the mother's custody and placed her in foster care. The court ordered Agency to conduct a reasonable search to locate Juan and notify him of the proceedings.

In early September 2004, Agency informed the court that Juan had been located in an immigration holding facility in North Las Vegas and was willing to participate in

² All rule references are to the California Rules of Court.

³ The mother is not a party in this writ proceeding.

services. At a special hearing on September 13, the court designated Juan as an alleged father and appointed counsel to represent him.

In November 2004, Juan was released from the detention center and remained on parole until January 15, 2005. His parole officer reported Juan successfully completed programs in substance abuse, anger management, life skills orientation and adult assessment systems. Juan obtained a general education degree and attended Narcotics Anonymous meetings and English classes. After his release, Juan had two jobs: repair work in the apartment complex where he lived; and construction work.

Juan said he could not afford to travel to San Diego to visit Isabella, but he telephoned her weekly. Isabella's foster parents reported Isabella enjoyed the calls. Juan told the social worker he wanted custody of Isabella and would do whatever was required to obtain it.

At the six-month review hearing on January 18, 2005, Juan was not present but was represented by counsel. The court continued Isabella in foster care.

On February 16, 2005, the court found Juan to be Isabella's presumed father and entered a judgment of paternity. The court also ordered an evaluation for Juan in Nevada under the Interstate Compact for the Protection of Children (ICPC) and ordered Agency to formulate a case plan for him.

On March 2, 2005, the court ordered Juan to participate in his case plan, which required him to participate in individual therapy, domestic violence counseling if recommended by the therapist and parenting education.

In May 2005, the Department of Family Services of the state of Nevada denied the ICPC approval because Juan had not completed at least 75 percent of his case plan and recommended the ICPC request not be resubmitted until Juan had accomplished that.

By mid-July 2005, Juan had completed five parenting courses and drug testing, and had attended 23 of 26 sessions (with no absences) in a domestic violence treatment program. The program facilitator noted that Juan's "attendance is excellent and participation is great and prognosis is good." On July 17, Juan visited Isabella for the first time in her foster home. The foster mother reported that Juan appeared interested and focused on interacting with Isabella.

On July 18, 2005, the court ordered a new ICPC evaluation for Juan in Las Vegas.

At the contested 12-month review hearing on September 26, 2005, the court found Juan had made substantive progress with his case plan and there was a substantial probability that Isabella would be returned to his custody by the 18-month date. The court ordered six more months of services for Juan, but terminated services for the mother.

By November 2005, Juan's therapist reported that Juan had perfect attendance, was responsive to therapy, and showed progress in his learning abilities. The therapist opined that Juan did not present a risk to Isabella and recommended reunification. In early November, the social worker observed a visit with Juan and Isabella. The social worker reported Isabella "seemed shy" around Juan. The ICPC evaluation had not been completed; the ICPC officials in Nevada wanted Juan to undergo an alcohol assessment.

On April 18, 2006, the Nevada ICPC office reported that several pending issues needed to be resolved before Juan's ICPC could be approved. Juan was required to submit arrest record information, remove an out-of-order refrigerator from his yard or put a lock on it, and enclose his yard to prevent the neighbor's pit bull dog from entering. In late April, Juan's ICPC was denied.

On June 14, the court held a contested 18-month review hearing. The social worker recommended termination of Juan's services "mainly because of the ICPC being denied and also . . . there's . . . not a relationship between the father and Isabella." The social worker testified that Agency's policy was not to place a child with a parent residing in another state without ICPC approval.

The court found Juan had not made substantive progress with his case plan and placing Isabella with him would create a substantial risk of detriment to the child's physical and emotional well-being. The court based its detriment finding on the lack of a relationship between Juan and Isabella and the ICPC, which was never completed. The court terminated Juan's reunification services and set a section 366.26 hearing. The court also ordered Agency to reinstate Juan's ICPC in Las Vegas.

On June 27, 2006, the father filed a notice of intent to file a petition seeking extraordinary writ relief under rule 38.1 (now rule 8.452) from the court's order setting the section 366.26 hearing. On September 25, the court vacated the section 366.26 hearing at Agency's request. On October 6, this court dismissed Juan's writ petition as moot because the juvenile court had vacated the section 366.26 hearing.

The intervening event that led to the June 14, 2006 order being vacated was this court's opinion in *In re John M.* (2006) 141 Cal.App.4th 1564, which was filed on August 16. Among other things, we held ICPC compliance is not mandatory when a California court places a child with a parent residing in another state. (*Id.* at pp. 1573-1575.)

In late September 2006, the Nevada Department of Family Services denied Juan's ICPC for the fourth time, closed the case, and asked Agency to not make any more referrals regarding Juan. The Nevada assessment worker had learned that Isabella's mother said she was planning to reunite with Juan after she completed her drug program, but Juan had not disclosed this information to the Nevada social worker. Juan had acknowledged to the Nevada social worker that he had participated in a domestic violence incident in 2003, but portrayed himself as the victim because Isabella had removed items he had purchased from their apartment.⁴ The Nevada assessment worker also said there were "safety hazards" in Juan's house, such as a drill and a saw in the dining room. She also noted that in the living room, chairs were turned upside down and there was a picture of a provocatively dressed woman, which she thought was inappropriate. The Nevada social worker wrote:

"This worker cannot recommend placement of the minor with [Juan] as I cannot ensure adequate supervision of the minor when [Juan] works. Furthermore, this worker has concerns about [Juan] and [Isabella's mother] getting back together in view of their traumatic history and the poor bond between [Juan] and Isabella. It appears that they may need family counseling to address their problems."

⁴ On January 1, 2003, according to the Las Vegas police report, Juan pursued Isabella's mother in a parking lot while she was running with Isabella in her arms. When Juan caught up with Isabella's mother, he grabbed her and punched her. Isabella was punched once on the left side of her face and had a red mark under her eye.

Because it refused to approve an ICPC for Juan, the Nevada social services agency would not provide services or any type of intervention, and would not have in-person contact with Isabella and Juan if the child were placed with Juan in Nevada.

On November 28, 2006, the juvenile court set the matter for a contested special hearing to determine "whether there should be services offered to the father and if there is detriment to placing the minor with the father in Las Vegas."

Agency social worker Juan Estrada was critical of Juan for bringing two friends to a November 29, 2006 visit at a McDonald's restaurant and spending most of the time talking to them. Afterward, Estrada rebuked Juan, who said he did not see anything wrong with having his friends attend the visit. Juan said he was able to interact with Isabella and his friends at the same visit. Estrada opined that Juan used poor judgment.

At the contested special hearing on February 1, 2007, Estrada testified he was concerned that Juan had blamed Isabella's mother for the domestic violence in the parking lot. Estrada also was concerned that Isabella's mother had not participated in a domestic violence program and, if the parents reunited, violent altercations could occur again.

Estrada testified that in the two and one-half years that Isabella had been in foster care, Juan had visited her only four times, coinciding with court appearances. Although Estrada encouraged Juan to visit Isabella more often, he did not.

Estrada acknowledged that Juan had completed his case plan in July 2005 and that at the hearing eight months earlier he (Estrada) had testified that if Juan were living in California it would have been appropriate to place Isabella with him.

Juan testified that in his domestic violence classes he had learned to be nonviolent, to practice self-control, and to get along with everyone. Juan understood that stress, pressure, drugs and alcohol often triggered domestic violence. Although Isabella's mother was partially to blame for the domestic violence, Juan testified it also was his fault. If Juan had custody of Isabella in Nevada and the mother came to his home, he would allow her to visit with Isabella. But Juan said it would not be appropriate for the mother to live with him. He would not allow the mother to live with him unless he could verify she had finished her programs and was no longer on parole.

Juan testified he had not visited Isabella more frequently because at one point his leg was in a cast, he was working two jobs, and he had lost a construction job because of court appearances. Juan, who did not have a car, traveled from Las Vegas to San Diego by Greyhound bus. The bus first went to Los Angeles, where Juan had to transfer to a bus that went to San Diego. The bus trip cost him \$106. In addition to his four visits with Isabella, Juan tried to visit her two other times, but she was unavailable.

The court found, by clear and convincing evidence, Agency had met its burden under section 361.2 to demonstrate that placing Isabella in Juan's custody in Las Vegas would be detrimental to the child's safety. The court noted:

"I must admit that the father has done everything he can as a father given the direction he was offered really through this Agency or by the Nevada authorities, but nonetheless based upon the testimony

offered it appears that this father really didn't have an understanding of the domestic violence issues and based upon the order and frequency of visitation he has really had insufficient contact to develop a relationship with this child."

The court added:

"I'm satisfied there is detriment based upon what appears to be the father's lack of understanding of the issues that are very significant relating to domestic violence, on the issue of visitation, and the other potential is that there is based upon the statements of the parents a stated possibility of reunification of mother and the father, the father with issues that are still existing and the mother with the issues that were never resolved."

The court terminated services and set a section 366.26 hearing.

DISCUSSION

Juan contends the juvenile court should have ordered Isabella returned to his custody because he had substantially completed his case plan and because there would be no detriment to her. The contention is without merit.

Section 361.2 provides that when a child is removed from his or her custodial parent under section 300, the juvenile court must place the child with the nonoffending, noncustodial parent unless the court finds by clear and convincing evidence that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.⁵

⁵ Section 361.2 reads: "(a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

"A detriment evaluation requires that the court weigh all relevant factors to determine if the child will suffer net harm." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425.) A court's ruling under section 361.2, subdivision (a) that a child should not be placed with the noncustodial, nonoffending parent requires a finding of detriment by clear and convincing evidence. (*In re Luke M.*, *supra*, at p. 1426; see also *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827-1829.)

Similarly, at the 18-month review hearing, the court must return a child to the parent "unless the court finds . . . that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a).) However, at an 18-month review hearing, the Agency's burden is to establish the detriment by a preponderance of the evidence – not by clear and convincing evidence. (*Ibid.*)

In explaining the purpose of the section 366.22 hearing, it has been noted:

"[T]he Legislature has determined a child's need for stability and security within a definitive time frame becomes paramount. The cutoff date for fostering family reunification is the 18-month status review. At this hearing, the court must return children to their parents and thereby achieve the goal of family preservation or terminate services and proceed to devising a permanent plan for the children." (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1788.)

Mandatory reunification services are limited to no more than 18 months. (§ 361.5, subd. (a).)

Here, after the orders issued at the 18-month review hearing held in June 2006 were vacated, the juvenile court held a special hearing on February 1, 2007, and

considered the issue under section 361.2. Thus, the court applied a heavier burden of proof to Agency than it would have if it conducted a new 18-month hearing.

When a detriment finding under section 361.2, subdivision (a) is challenged on appeal, we consider the record most favorably to the finding and determine whether there was substantial evidence from which a reasonable trier of fact could make the finding by clear and convincing evidence. (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426.) As a reviewing court, we may not reweigh or express an independent judgment on the evidence. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) Issues of fact and credibility are matters for the trial court alone. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 859- 860.) The fact there may also be sufficient evidence to support a contrary ruling by the trial court does not mean the ruling the court made was incorrect.

The social worker's reports and the other evidence cited above provide substantial evidence to support the juvenile court's finding of detriment under section 361.2, subdivision (a).

Even though Juan had promptly completed his case plan, there was substantial evidence that returning Isabella to Juan would be detrimental to her well-being. One and one-half years after completing a domestic violence treatment program, Juan was blaming Isabella's mother and skirting his own responsibility for the domestic violence in their relationship. This included an incident in which a punch apparently intended for Isabella's mother landed on the left side of Isabella's face. (See fn. 4, *ante*.) Physical abuse between adults in a home is harmful to the children who live there. (See *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.) "[D]omestic violence in the same household

where children are living . . . is a failure to protect [them] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Domestic violence also adversely impacts children, even if they are not ones being physically hurt, "because they see and hear the violence and the screaming." (*Id.* at p. 192.)

Juan's refusal to fully take responsibility for past domestic violence indicates that although he had attended courses, he had not accepted basic principles of domestic violence treatment. This does not bode well for Juan's future ability to maintain a violence-free relationship with Isabella's mother or another woman.

Even completion of the reunification plan does not guarantee that a child can safely be returned to his or her parent. Although failure to comply with a reunification services plan supports a detriment finding, it does not logically follow that compliance with a reunification services plan precludes a detriment finding. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704.) The court must still determine whether returning the child will create a substantial risk of detriment. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 917-918.) The court must evaluate not only whether the parent is currently capable of providing an adequate home for the child, but whether he or she is likely to be able to maintain a stable, sober and noncriminal lifestyle for the remainder of the child's childhood. (*Id.* at p. 918.)

Juan showed poor judgment and a lack of insight by inviting friends to join him in one of the rare visits he had with Isabella. Juan, who should have been focusing entirely on his daughter during the visit, did not understand why the social worker considered it

inappropriate to bring his friends to the visit. Additionally, Juan did not seem to comprehend the need to have safe and responsible caretakers for Isabella when he was at work or the safety issues raised by keeping potentially dangerous tools in the dining room. The court could reasonably infer that Juan did not understand the quality of care he needed to provide a young child and was not at that time capable of providing an adequate and safe home for Isabella.

Juan argues that at the February 1, 2007 special hearing the court violated *In re John M.*, *supra*, 141 Cal.App.4th 1564 by basing its detriment finding on the negative ICPC from Nevada just as it did at the 18-month review hearing in June 2006. Juan is mistaken. In *In re John M.*, *supra*, 141 Cal.App.4th 1564, this court held a positive ICPC is not required for an out-of-state placement with a noncustodial, nonoffending parent. (*Id.* at pp. 1573-1575.) However, at the same time, we said a court may obtain information about an out-of-state parent's home through the ICPC process. (*Id.* at p. 1572.) "While . . . ICPC compliance is not required for an out-of-state placement with a parent, nothing in the ICPC prevents the use of an ICPC evaluation as a means of gathering information before placing a child with such a parent." (*Ibid.*) This is what the juvenile court did. Additionally, unlike the father in *In re John M.*, there is uncontested evidence of Juan being involved in a domestic incident in which he injured Isabella and placed her at risk. There was no error.

DISPOSITION

The petition is denied.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.